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May 29, 2008

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*REPLY TO:*

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**Via Electronic and First Class Mail  
and Electronic Filing**

Honorable Joseph J. Farnan, Jr.  
United District Court for the  
District of Delaware  
Lockbox 18  
844 N. King Street  
Wilmington, DE 19801

**RLI Insurance Company v. Indian River School District, et al.  
United States District Court for the District of Delaware  
Civil Action No. 1:05-cv-00858-JJF  
Our File No. 729.004**

Dear Judge Farnan:

As your file will reflect, this office represents RLI Insurance Company, the Plaintiff in the above-captioned matter.

This case is scheduled for a jury trial commencing on July 21, 2008. The Court has scheduled a final pretrial conference for Thursday, June 5, 2008.

On Tuesday, May 27, 2008, an issue arose between the parties with respect to trial testimony of one witness who is employed by one of the parties in this case. Because of the critical timing of this issue, we would like to address this matter with the Court at the time of the pretrial conference on June 5.

Your Honor issued a ruling on May 12, 2008 which in pertinent part denied RLI's Motion to Compel the discovery deposition of EDiS' employee, Christian McCone. The Court's Memorandum Order is listed on the docket as D.I. 138.

In light of Your Honor's ruling on May 21, 2008, we noticed the videotaped trial deposition of Mr. McCone for use as part of RLI's affirmative claim. A copy of our letter of May 21, 2008 to Victoria K. Petrone, Esquire, counsel for EDiS, is attached to this letter as Exhibit 1.

As the Court knows from the moving papers of the parties on the Motion to Compel, Mr. McCone was in the United States Army Reserves and was deployed to Kuwait for an extended period of time while

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this case was pending. It has been represented by counsel that he has returned to Delaware; however, it has not been represented that he is no longer a member of the Reserves or not subject to re-deployment. Furthermore, there has been no representation that Mr. McCone will be employed by EDiS at the time of trial, especially in light of today's economic climate. RLI wishes to preserve his testimony for use at the upcoming trial in case he should, for any reason, be unavailable.

On May 27, 2008, we received via email a letter from Ms. Petrone stating that EDiS refuses to produce Mr. McCone for this deposition. Ms. Petrone's letter is attached hereto as Exhibit 2. As the Court will see, Ms. Petrone asserts that the trial deposition would be inadmissible under F.R.C.P. 32 and two cited cases.

It is respectfully submitted that Ms. Petrone's letter misses the point and purpose of RLI's Notice of Deposition. While it has been represented that Mr. McCone is "available" for trial, defense counsel cannot guarantee that one of the circumstances set forth in F.R.C.P. 32(a)(3) will not occur. Mr. McCone is an important witness who has never been deposed in this case for any purpose, and while the defense may be sufficiently confident of the likelihood of his appearance to forego his trial deposition, RLI does not share that confidence. Out of an abundance of caution, RLI wishes to preserve his testimony for use at trial. If, in fact, Mr. McCone is available to testify when the trial commences, RLI will not need to present his preserved trial testimony. However, until and unless that availability becomes a certainty, RLI is not willing to risk the possibility that unforeseen events will render Mr. McCone unavailable. Therefore, we request that the Court direct EDiS to make Mr. McCone available for a videotaped deposition to preserve trial testimony on a mutually agreeable date prior to the trial on July 21, 2008.

Thank you for your attention to this matter.

Very truly yours,



HARRY R. BLACKBURN

HRB/erl

cc: Via Electronic and First Class Mail:  
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Paul Cottrell, Esquire  
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